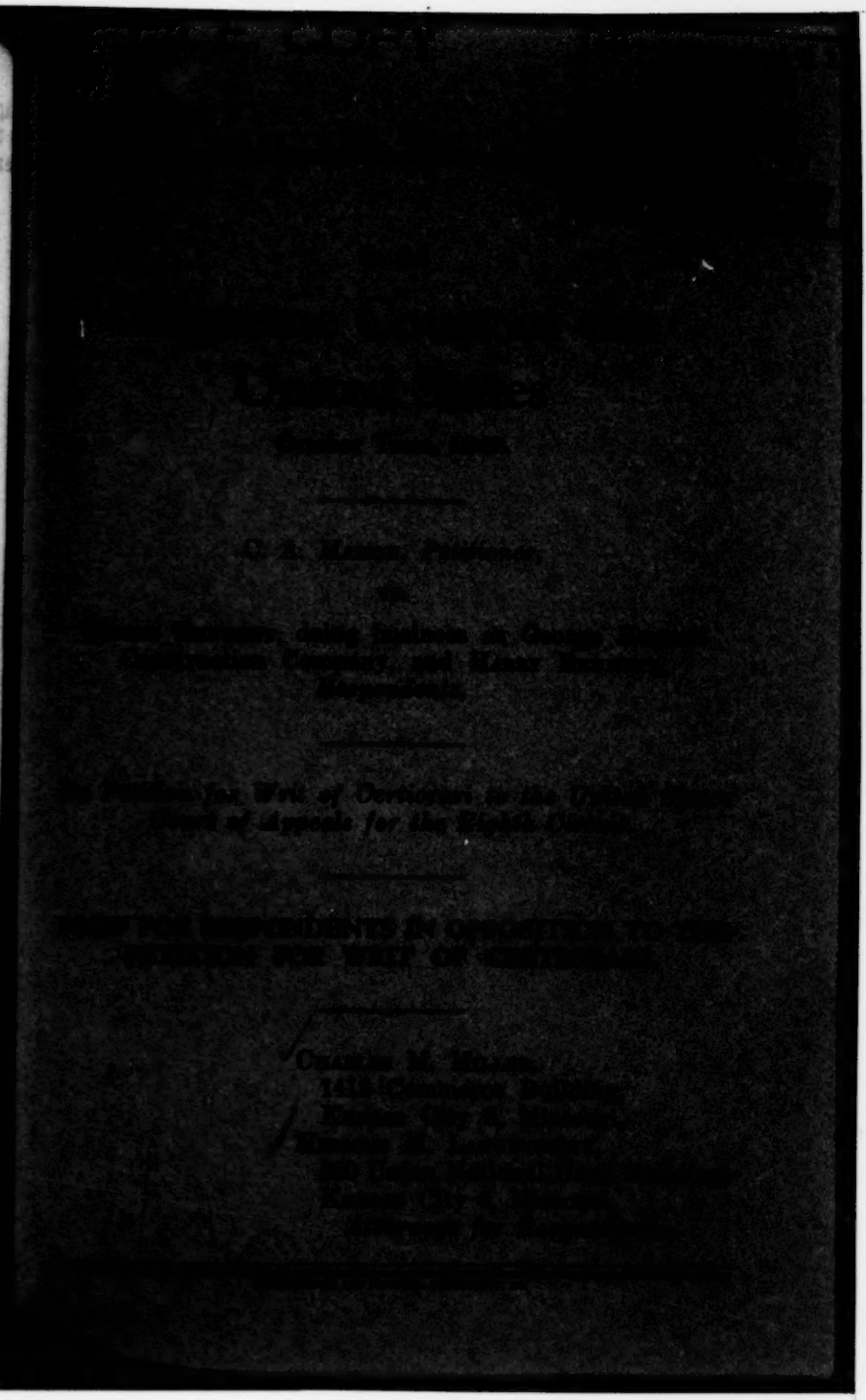

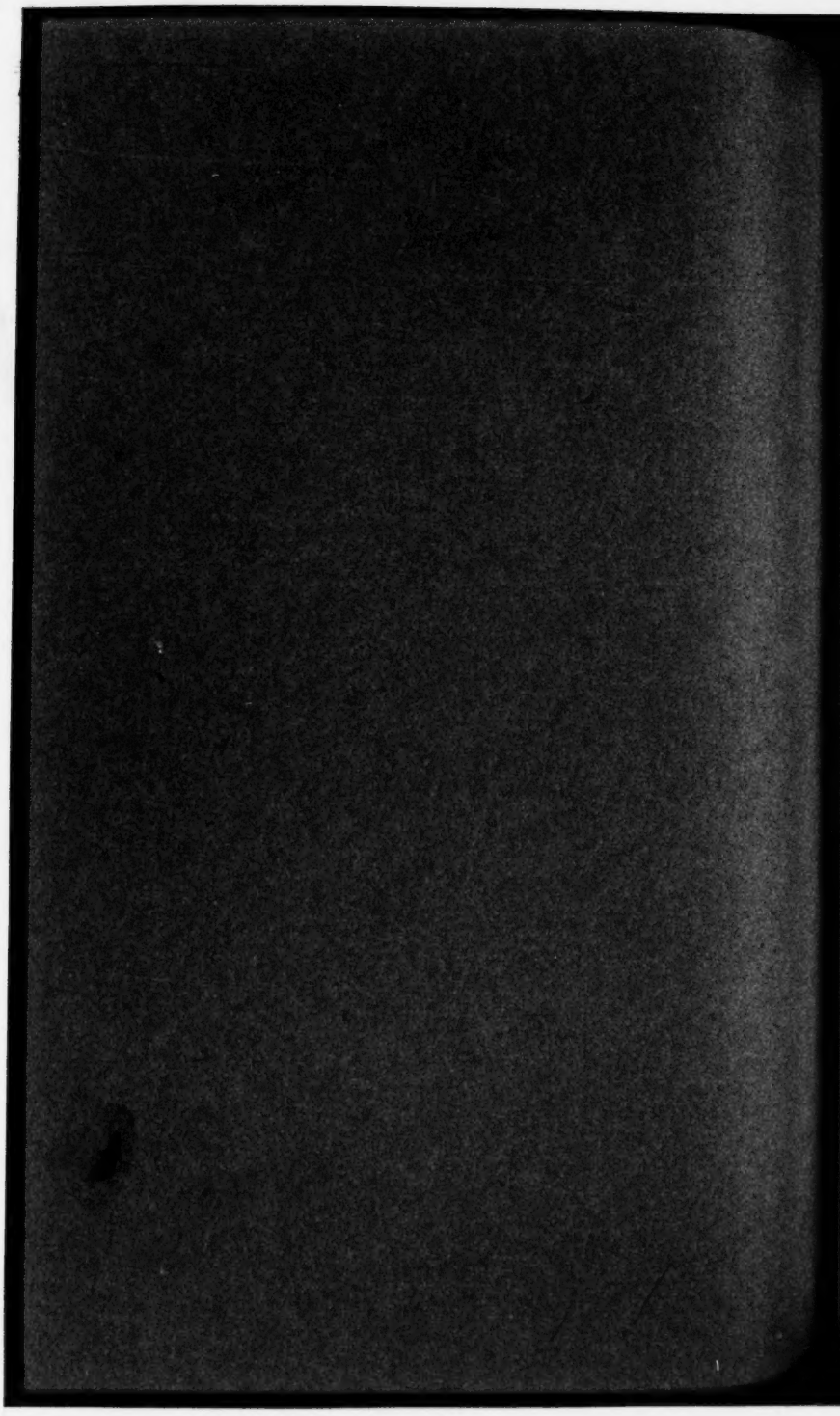

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In the

Supreme Court of the United States

October Term, 1949.

C. A. MAHON, *Petitioner,*

vs.

GEORGE BENNETT, doing business as George Bennett Construction Company, and HARRY BENNETT, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

No. 784.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The Petitioner in this action filed his Petition for Writ of Certiorari in this Court, accompanied by the Record in the case, on April 28, 1950; and thereafter on May 2, 1950, Notice of the Filing of the Petition, together with a copy of the Petition, printed Record and supporting brief, were served on Counsel for the Respondents. It is the contention of the Respondents that the Petitioner has not presented, and that the Record in the case does not present, any adequate ground for the granting of the Writ, and the Petition should therefore be denied.

Opinions Below.

The opinion of the District Court of the United States for the Western District of Missouri (R. 733) is reported in 81 Fed. Supp. 901. The opinion of the Court of Appeals for the Eighth Circuit (R. 762) is reported in 180 F. 2d 224.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 14, 1950 (R. 780). A Petition for Rehearing was filed on March 1, 1950 (R. 809), and was denied March 8, 1950 (R. 811). The jurisdiction of this Court is invoked by the Petitioner under Title 28, U. S. C., Sections 1254 and 2101 (c) of the new Judicial Code.

STATEMENT.

There are certain inaccuracies in the Petitioner's statements concerning some of the pertinent facts in the case and the issues involved, and also concerning the precise questions which were decided by the Court of Appeals, and it is therefore necessary for the Respondents to present a short statement of the matters involved.

This action was instituted in the Circuit Court of Jackson County, Missouri, on April 4, 1946 (R. 1), and it was thereafter removed to the United States District Court, Western Division of the Western District of Missouri, on the ground that the Petitioner (Plaintiff in the District Court, and sometimes hereinafter referred to as the "Plaintiff") and the Respondents (Defendants in the District Court, and sometimes hereinafter referred to as the "Defendants") were citizens of different states and that the requisite jurisdictional amount was involved (R. 9).

The Nature of the Action.

The Petition (R. 1-8), which is in one count, presented a combined action in equity and at law in which the plaintiff sought to have the court find, declare, and hold

> (a) that an *oral agreement* of joint adventure or partnership was entered into between the plaintiff and the defendant George Bennett as the result of discussions between them beginning in November, 1944; that a *written contract* dated March 12, 1945, between the plaintiff and defendant George Bennett covering the same subject matter was obtained by said defendant from plaintiff by duress and should be disregarded; that both defendants be enjoined

from interfering with plaintiff's participation in said joint adventure under said alleged oral agreement of joint adventure; and that both defendants be required to account to the plaintiff for all profits derived from the operation of said joint adventure; *or in the alternative*

(b) that plaintiff recover the sum of $500,000.00 in damages from both defendants for the alleged breach of said written contract of March 12, 1945.

The Plaintiff's Claims.

The Petition (R. 1-8) alleges in substance:

That the ten-year contract between Kansas City, Missouri, and Sanitary Service Company for the collection and disposal of garbage in Kansas City, Missouri, was about to expire in July, 1945; that plaintiff had acquired information in respect to the requirements relating to the collection and disposal of garbage; that beginning in November, 1944, and for several months thereafter, plaintiff entered into negotiations with the defendant George Bennett, with the result that an oral agreement was entered into between plaintiff and said Bennett under the terms of which said Bennett was to submit a bid to the City for the collection and disposal of its garbage, if and when the city of Kansas City should advertise for such bids; and if the submitted bid resulted in an award, the plaintiff and said defendant George Bennett would perform the contract with the City under a partnership or joint adventure agreement between them whereby the plaintiff would devote all of his time, efforts and abilities to the management and operation of the collection and disposal business and contribute $10,000.00 in cash towards the capital of the joint adventure, and the defendant George Bennett would make an initial contribution of $150,000.00 in cash toward the capital of the joint ad-

venture and as much more as was necessary, upon the further agreement and understanding that the profits and losses from the operation of the business would be shared equally between the plaintiff and the defendant George Bennett, and upon the further agreement and understanding that the cash capital contributions of plaintiff and defendant George Bennett would be returned to them out of profits in proportion to their respective cash contributions;

That the City advertised for bids to be opened on March 12, 1945; that a bid was submitted by George Bennett; and that said George Bennett was thereafter awarded the contract by Kansas City, Missouri, for the collection and disposal of garbage for the City during the period from July 16, 1945, to April 30, 1955;

That on March 3, 1945, the defendant George Bennett notified plaintiff that he would not go through with said alleged oral agreement of joint adventure, but that if he (Bennett) was awarded the City contract, he would employ plaintiff for the period of the awarded contract at the rate of $600.00 per month and ten per cent of the profits; that plaintiff could accept said offer or be deprived of any participation whatever in the garbage collection and disposal business;

That because of the coercion, duress and business compulsion of the said defendant's threats, the plaintiff thereafter on March 12, 1945, prepared and entered into a written contract with the defendant George Bennett whereby if the garbage contract was awarded to said Bennett, said Bennett would employ the plaintiff as general manager at $600.00 per month and ten per cent of the profits, a copy of said written contract being attached as Exhibit "A";

That in April, 1945, plaintiff began the management and operation of said garbage contract with the City for the defendant George Bennett under said written contract, and proceeded to devote his time and efforts to said enterprise until about August 29, 1945, when the defendant George Bennett without reasonable cause notified the plaintiff that he was no longer connected with the organization, "and thereby wrongfully and without reasonable cause or excuse breached both the oral agreement of joint adventure and the written agreement, into the signing of which the plaintiff had wrongfully been coerced";

That thereafter in September, 1945, an agreement was entered into between defendant Gorge Bennett and defendant Harry Bennett whereby that part of the garbage contract relating to the collection of garbage was sublet to Harry Bennett;

That shortly before the filing of this suit, plaintiff's mind was for the first time removed from the duress of the threats of the defendant George Bennett, and plaintiff was first advised of his rights under said oral joint adventure agreement, notwithstanding the signing of the written agreement; and that plaintiff stands ready to perform said oral agreement of joint adventure and to do equity as a condition to the relief sought under the first paragraph of the prayer; and in the prayer:

> (a) That the court find and decree that the plaintiff and defendant George Bennett entered into the oral agreement of joint adventure above referred to; that the defendants be enjoined from interfering with the plaintiff's right to participate jointly therein; that defendants be required to account to the plaintiff; and that the court find that the written contract was entered into through duress and coercion;

(b) That, in the alternative, plaintiff recover as damages for the wrongful breach of the written contract the sum of $500,000.00.

The Issues Tried and the Decision Thereon.

The defendants filed separate Answers and the issues tried were:

(a) Whether an oral agreement of joint adventure was entered into between the plaintiff and the defendant George Bennett as alleged in the petition; and if so

(b) Whether the plaintiff was wrongfully coerced into entering into the written contract of employment of March 12, 1945; and

(c) If there was no oral agreement of joint adventure or if, one having been entered into, plaintiff was not coerced into entering into the written contract of March 12, 1945; then whether there was a breach of the written contract by the defendant George Bennett, and if so, the amount of damages to be awarded.

This case was tried twice in the court below and the appeal to the Court of Appeals was taken from the judgment entered against the defendants on the oral agreement of joint adventure at the close of the second trial (R. 742).

Prior to the first trial the plaintiff filed a demand for a trial by jury "for all issues herein so triable" (R. 14); and requested the court "to try all issues not triable of right by a jury with an advisory jury" (R. 15).

At both trials the court, over the objections of the defendants (R. 21-25; 122-123), impaneled one jury (1) to act as an advisory jury in respect to questions concerning whether there was an oral agreement of joint adventure as alleged by plaintiff, and whether the plain-

tiff was wrongfully coerced into entering into the written agreement of March 12, 1945; and (2) to act as a common law jury in respect to questions concerning the alleged breach of the written contract of March 12, 1945, and the amount of damages to be awarded, if any, if a breach of said written contract was established. At both trials, at the request of plaintiff and over the objections of the defendants, the jury was instructed in substance that if they found that there was an oral agreement of joint adventure, and that if the plaintiff was wrongfully coerced into entering into the written contract of March 12, 1945, they should so report to the court as an advisory jury and take no further action in the case; but that if they found that there was no oral agreement of joint adventure or that if there was an agreement of joint adventure and if plaintiff was not coerced into entering into the written contract, the jury should then proceed to consider and determine whether there was a breach of the written contract, and if so, the amount of damages to be awarded (R. 53-56; 643-646).

At the first trial the jury acting as an advisory jury in equity found that there was no oral agreement of joint adventure (R. 86), and acting as a common law jury, found that there was a breach of the written contract, and returned its verdict on that issue in favor of the plaintiff and against the defendant George Bennett, and assessed plaintiff's recovery in the sum of $5,000.00 (R. 87).

The court thereafter sustained the plaintiff's motion for a new trial (R. 114), on the ground that the jury having found that there was a breach of the written contract, the amount of the award was inadequate (see Memorandum Opinion of the Court, R. 89-93).

At the second trial, the jury, acting as an advisory jury in equity, found (directly to the contrary of the verdict

of the advisory jury at the first trial) that the plaintiff and the defendant George Bennett had entered into an oral agreement of joint adventure, and that the plaintiff signed the written agreement of March 12, 1945, as the result of coercion and duress, and returned its verdict on the special questions submitted accordingly (R. 687). The jury, acting as an advisory jury in equity, having answered the special questions affirmatively, took no action as a common law jury on the issue concerning whether there was a breach of the written agreement of March 12, 1945 (R. 687-8).

After a hearing (R. 697-783) upon the motion of the defendants to reject the verdict of the advisory jury, and for other relief (R. 690-697), the court, sitting as a court of equity, filed its opinion on December 27, 1948, denying said motion (R. 733-738); and immediately, on the same day, entered its finding of fact and conclusions of law, and rendered its judgment and decree in favor of the plaintiff and against the defendants (R. 738-744).

By its judgment and decree (R. 742-744), the court decreed that plaintiff and defendant George Bennett are joint adventurers each with an equal interest in the garbage collection and disposal contract, and the fruits thereof, between the city of Kansas City, Missouri, and said George Bennett, beginning July 16, 1945, and ending April 30, 1955, and each with an equal interest in all property, real, personal and mixed, acquired in performing said contract or in connection with the operation thereof; and that each is equal in power, right and obligation in the operation and management of the business and in performing and carrying out said contract and in the financial rights and obligations flowing from said relationship.

The court by its judgment made further orders in reference to relief to be granted to plaintiff in the event that

he should be excluded from participating in the operation of the joint adventure; and in reference to the accounting procedure to be followed by the defendants during the life of the contract (R. 742-744).

Outline of Evidence Relating to the Issues Presented and Decided.

The plaintiff's claim of an oral agreement of joint adventure with the defendant George Bennett is based solely upon the plaintiff's testimony, and two letters written by the plaintiff to the defendant George Bennett.

The substance of the plaintiff's testimony in support of his claim of an oral agreement of joint adventure is as follows:

That on November 4, 1944, the plaintiff was introduced to defendant George Bennett by Clyde J. Linde, who had performed some legal services for both the plaintiff and for the defendant George Bennett (R. 155); that during his first conference he outlined to Mr. Bennett the profit possibilities in the performance of a garbage collection and disposal contract with Kansas City, Missouri, and indicated that about 15,000 hogs per year could be fed and fattened on garbage collected in Kansas City; that the performance of a contract for the collection and disposal of garbage would require a capital investment of $160,000.00; and that he proposed that he would advance $10,000.00, that Mr. Bennett should advance $150,000.00, and that he would manage the entire operations in the performance of the contract and receive fifty per cent of the profits (R. 155-159);

That he continued to keep in touch with Mr. Bennett and again called upon him on about November 11, 1944, and again renewed his proposal, at which time he testified that Mr. Bennett said, "That suits me fine," and

said, "I am very happy to have that type of business offered and will hope very much that we can get the contract" (R. 161); that thereafter he continued to contact Mr. Bennett; that Mr. Bennett asked him to write him a letter outlining his proposal and his estimates of cost and operating conditions (R. 162-163); and that he wrote such letter on December 11, 1944 (R. 163).

In this letter (Plaintiff's Exhibit 1, R. 164-168, 173-177), the plaintiff outlined his estimates of the required capital expenditures, of the costs of operation, and of the profit possibilities; and also set forth estimates of the basis upon which the invested capital would be returned over a period of years out of estimated profits, and the basis of the split of the net profits.

The plaintiff further testified that on January 17, 1945, he again wrote the defendant George Bennett a letter with a memorandum (R. 171) outlining various alternative bids which might be submitted (Plaintiff's Exhibit 2, R. 184-187); that he discussed both of said letters with Mr. Bennett (R. 168, 188-189), and that Mr. Bennett did not protest to that part of the letter of January 17, 1945, in which he recited "the fifty-fifty division of the profits" (R. 189);

That early in the year 1945, he reached the conclusion that a capital investment of $160,000.00 would not be adequate for the performance of the garbage collection and disposal contract, and Mr. Bennett stated that he would be able to borrow from his bank the additional capital required and told the plaintiff not to seek additional capital elsewhere (R. 179-180); that plans and specifications for a new garbage collection and disposal contract were issued by the City on February 15, 1945 (R. 170-171), and supplements thereto were issued as late as March 1, 1945 (R. 248; and see R. 408).

The plaintiff introduced in evidence the bid for the collection and disposal of garbage in Kansas City, Missouri, submitted by George Bennett (plaintiff's Exhibit No. 7, R. 353-357); the official contract between the city of Kansas City and Mr. George Bennett, including Notice to Contractors, Contract Document, and Performance Bond in the sum of $50,000.00, executed by George Bennett and by The Western Casualty & Surety Company (plaintiff's Exhibit No. 8, R. 358-413); and also the Ordinance of the City Council approving the contract (plaintiff's Exhibit No. 9, R. 414-415).

The contract for the collection and disposal of garbage is lengthy (R. 358-413) and provides for the work to be performed, the type and amount of equipment to be supplied, and the method of performance in great detail; and reserves very complete powers of supervision by the City authorities.

In respect to his claim that the written contract of March 12, 1945, between plaintiff and George Bennett was entered into as the result of coercion and duress, the plaintiff testified in substance:

That on March 3, 1945, after receiving the final supplement to the City's plans and specifications, Mr. Bennett called him to his office and stated that, "I am not going through with our agreement"; that: "I will give you a proposition that I think will be better for you"; that: "I won't ask you to put any money into the venture"; that: "I will give you a job, and I will give you a lot better job than you have where you are now. I will give you $600.00 a month and ten per cent of the profits"; and that Mr. Bennett further stated that he was going to bid the contract and that if Mr. Mahon did not come in on his proposition, he would be out (R. 181-182);

That he (plaintiff) told Mr. Bennett that his proposition did not interest him, that: "I have spent years get-

ting ready for it and I expect to go through with it the way we have agreed upon it'' (R. 181-182); that he then proceeded to make some investigations to see if anyone might help him in his situation; that he discussed his proposal with others, but it was too late to raise enough money to finance the business or to get anyone else to go in with him, and that he went back to Mr. Bennett several times presenting different propositions but that Mr. Bennett would not increase his offer (R. 182-183);

That on Sunday, March 11, 1945, he discussed the matter with Mr. Linde at his office and told him that Mr. Bennett would not make any change in his offer of $600.00 a month and ten per cent of the profits; that Mr. Linde said he felt the best thing for him to do would be to take Mr. Bennett's offer and get it in writing; that he requested Mr. Linde to draw up a contract, but that Mr. Linde said that he would prefer not to draw up a contract as he was representing Mr. Bennett the same as the plaintiff; but that Mr. Linde finally sketched out on a piece of paper what he thought would cover the conditions Mr. Bennett had offered (R. 182-183).

Plaintiff further testified that he then went to his office in the City Hall and prepared the contract of March 12, 1945, on his own typewriter (R. 195, 245), and went to Mr. Bennett's office in Kansas City, Kansas, on March 12, 1945, at which time the written contract of March 12, 1945, as prepared by plaintiff, was signed (R. 197) by the defendant George Bennett and by plaintiff (plaintiff's Exhibit 4; R. 198-199); that on the same day, the defendant George Bennett submitted his bid to the City authorities and that Mr. Bennett was awarded the contract for the collection and disposal of garbage for the period from July 16, 1945, to April 30, 1955 (R. 199-201, 317, 414-415); that plaintiff resigned his position with

the City, effective March 31, 1945, and began work for George Bennett "under this written agreement" on April 3, 1945 (R. 201); and that he "worked for Mr. Bennett under this written agreement" from April 3, 1945, to August 31, 1945 (R. 203).

The plaintiff further testified that he signed the written agreement of March 12, 1945, under the belief that if he did not sign it he would lose the results of his efforts during the preceding five years (R. 203); that he left the service of Mr. George Bennett on August 31, 1945, and thereafter first consulted lawyers about his controversy with Mr. Bennett in December, 1945, or January, 1946 (R. 203, 204), at which time he discussed the matter with his present counsel, Mr. Paul R. Stinson, and that (R. 204-205):

> "Q. Up to that time had you ever been told by any lawyer that if you were coerced into signing that agreement that you were not bound by it or by anybody else?"
>
> * * * * * * *
>
> "A. I thought that I would have to comply with the conditions of the written contract which we had both signed, and that that would destroy the original contract which I had had with Mr. Bennett."

The defendant George Bennett admitted having discussions with the plaintiff during November, 1944, and subsequent months; and testified in substance that the plaintiff outlined a proposition in which he said he could raise about $10,000.00 if Mr. Bennett would raise $150,000.00, and that they would go into partnership (R. 429-430); that he told the plaintiff he was not interested in that at all, that he had had a partner for 18 or 19 years and did not want any more partners (R. 430); that the fig-

ures contained in the letter of December 11, 1944, did not mean anything because until the specifications were received from Kansas City, Missouri, there was no use talking about the figures in the letter of December 11, 1944 (R. 430-431); that he told the plaintiff that: "So far as I am concerned," * * * "I am just dreaming about the thing until we get the specifications" (R. 431); that the specifications were received about the middle of February, 1945, and that the last addendum to the specifications was received March 3, 1945 (R. 431, 433); that he then called the plaintiff to his office and told him he was ready to talk to him about making him a proposition, and asked him how much he was getting at his present job; that plaintiff told him he was receiving $300.00 a month; that he (Bennett) then told him he would give him $600.00 a month and ten per cent of the net profits in the event that he (Bennett) was awarded the contract; that plaintiff said he was not quite satisfied, that he would like to go into partnership; that he (Bennett) advised him (plaintiff) that "I never did entertain that at all. That was silly in my estimation"; that plaintiff then said he would "think it over" (R. 433).

The defendant George Bennett further testified that he never had made any agreement with plaintiff of any kind as to a partnership, or that plaintiff would be permitted to go into this operation and get fifty per cent of the profits and manage the business and put in $10,000.00; and specifically denied that he ever told plaintiff that he was "kicking him out," or that he was "repudiating" any alleged contract with him (R. 433-434). He further testified that plaintiff later urged him to increase the percentage of profits and finally on March 12, 1945, presented to Mr. Bennett the written contract of March 12, 1945,

which the plaintiff had prepared, and it was signed by both of them (R. 434-435).

The evidence showed that the plaintiff's estimate of the required capital investment of approximately $160,000.00 for the performance of the garbage collection and disposal contract with Kansas City, Missouri, was totally inadequate; that the trucks cost approximately $140,000.00 (R. 504); that the plant site cost $30,000.00; that the improvements in the plant site cost $15,000.00; and that the required number of garbage cans cost $11,000.00 (R. 504); that the approximate average number of hogs purchased for feeding was 4,700 (R. 335), and at the prevailng market prices (R. 521), with an average weight of 160 pounds (R. 335), the initial cost of these hogs would be in excess of $150,000.00; that it became necessary for Mr. Bennett to borrow from the bank for this operation on his own promissory note a total of $265,000.00 (R. 501); and it appeared that he had as high as $328,000.00 invested in the enterprise at one time (R. 517).*

The plaintiff and the defendants, as well as other witnesses, testified at length concerning other issues in the case, including the issues presented upon the plaintiff's claim for damages for the alleged breach of the written contract of employment of March 12, 1945. All of the evidence was incorporated in the record and was before the Court of Appeals upon the appeal from the judgment in favor of the plaintiff upon the oral agreement of joint adventure (R. 742, 754; and see Certificate of Reporter, R. 750-760).

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*The petitioner states in a footnote to his argument in support of the Petition for Writ of Certiorari (p. 21) that the plaintiff's accountant testified that the most money George Bennett had invested in this operation at any one time was $139,500.00; but he admitted on cross-examination that it was necessary to borrow an additional $240,000.00 to carry on the operations (R. 342).

The Decision of the Court of Appeals.

Upon the appeal to the Court of Appeals, the defendants (appellants in the Court of Appeals and respondents here) presented many assignments of error (see defendants' Motion for a New Trial, R. 744-757); but the Court of Appeals found it necessary to decide *only one issue,* to-wit: Whether under the facts and the law the plaintiff had established that the written contract of March 12, 1945, was entered into as the result of coercion and duress.

That this was the only issue actually decided by the Court of Appeals is demonstrated by the following excerpts from the Court's opinion and decision:

> "Among the errors assigned and argued for reversal of the judgment, the appellants contend that the following finding of fact made by the court was clearly erroneous:
>
> > 'Plaintiff Mahon signed the written agreement of March 12, 1945, because he was wrongfully coerced into doing so by the acts and conduct of the defendant George Bennett, in such manner that plaintiff's signature to the agreement was obtained by wrongful coercion and duress and not by the exercise of his own free will.'
>
> "Appellants contend that the finding is not supported by and is contrary to the evidence and requires reversal of the judgment" (R. 767-768).

After reviewing the evidence and applicable authorities the Court of Appeals then decided this issue as follows:

> "We are accordingly convinced that the finding that Mahon was coerced into contracting for employment and that he did not so contract of his own free will was clearly erroneous and must be set aside. The finding is not sustained by substantial evidence.

> *United States* v. *Gypsum Company,* 333 U. S. 364. We conclude that the relationship between Mahon and Bennett in respect of the garbage contract was evidenced and established by the written contract of employment of March 12, 1945, and not by any alleged oral contract'' (R. 779).

While the Court of Appeals reviewed and commented upon the evidence relating to other issues, it did not, as petitioner seems to assume, pass upon or decide the issue of whether the plaintiff had established an oral agreement of joint adventure, or whether the plaintiff's claim for damages for the alleged breach of the written contract of March 12, 1945, is meritorious.

THE QUESTIONS PRESENTED.

Regarding Question A.

In the first question presented by petitioner (Question A, page 4 of Petition), and in the Specifications of Error (Petition, page 5) and the argument (Petition, page 6) which follow, it appears that he seeks to have this Court review a decision which was not made by the Court of Appeals, to-wit: whether under the evidence and the provisions of Rule 52(a) the finding that the plaintiff and the defendant George Bennett entered into an oral agreement of joint adventure is subject to reversal. That question was not decided by the Court of Appeals and it was not necessary for the Court to decide that question, because it held that the written contract of March 12, 1945, was not obtained by duress, and that the written contract is therefore controlling.

If *on the record* the subject matter of petitioner's first question (A) is one which may be presented for the consideration of this Court at all, it should more properly be stated as follows:

A.

Whether the Court of Appeals exceeded its judicial powers under Rule 52(a) of the Federal Rules of Civil Procedure in deciding that the finding of the District Court that the plaintiff was coerced into entering into a written contract was clearly erroneous and must be set aside, because not sustained by substantial evidence (R. 779); it appearing that the decision of the Court of Appeals was based upon an (R. 768) "independent examination of the record, recognizing that we (the Court of Appeals) should sustain the finding unless it was clearly erroneous";

and it further appearing that the Court of Appeals after giving full effect to all of the evidence of the plaintiff on the issue of coercion held that under the Missouri law the facts testified to do not constitute substantial evidence that the written contract was entered into as the result of coercion or duress.

Regarding Question B.

In the second question presented by petitioner (Question B, pages 4-5 of the Petition), and in the Specifications of Error (Petition, page 5) and the argument (Petition, page 32) which follow, the petitioner seeks to have this Court review a question which was not presented for decision to the trial court, nor to the Court of Appeals, and in respect to which counsel for the petitioner throughout the trial and in the Court of Appeals has taken a position diametrically opposite to that now sought to be sustained. Petitioner seems to take the anomalous position that in a case where equitable relief is sought (a) to establish an oral contract and have it enforced, (b) to set aside a written contract on the ground of duress, and (c) to have an injunction and accounting; nevertheless because the petitioner *could have* filed a law action in damages for breach of the oral agreement, and *could have* filed a law action for damages resulting from the exercise of duress, he is now entitled to have the equity action treated as a law action for the purpose of invoking the "right of trial by jury" guaranteed by the Seventh Amendment to the Constitution of the United States "in suits at common law"; and is now entitled to have the verdict of an advisory jury in equity treated as though it were the verdict of a common law jury in a law action.

If *on the record* the subject matter of petitioner's second question (B) is one which may be presented for the

consideration of this Court at all, it should more properly be stated as follows:

B.

Whether the plaintiff has been deprived of his "right of trial by jury" guaranteed by the Seventh Amendment to the Constitution of the United States "in suits at common law," (1) where the issues tendered by the pleadings and the relief sought were cognizable in equity, in that the plaintiff sought (a) to have the Court establish an oral contract, (b) to have the Court set aside an inconsistent written contract on the ground of duress, (c) to have the oral contract enforced by injunction, and (d) for an accounting; (2) where Counsel for the plaintiff and the trial court tried those issues in the District Court as equitable issues in accordance with equity practice; (3) where those issues were again treated as equitable issues by Counsel for the plaintiff in the Court of Appeals, and no contention was there made that said issues should have been tried as at common law by a common law jury, or that the verdict of the advisory jury in equity should be treated as the verdict of a common law jury; and (4) the Court of Appeals in its opinion indicated that review on those issues is governed by the Rules applicable to appeals in equity.

Regarding Question C.

In the third question presented by petitioner (Question C, page 5 of the Petition), and in the Specifications of Error (Petition, page 5) and the argument (Petition, page 35) which follow, the petitioner seeks to have this Court review a question which was not decided by the Court of Appeals, but which was merely commented upon. The Court had before it all of the evidence relating to the plaintiff's claim for damages for the alleged breach of

the written contract of March 12, 1945; and commented upon this evidence, as it had the right to do, in considering whether, in reversing and remanding the case, the case could properly be remanded for further proceedings on the law action.

If *on the record* the subject matter of petitioner's third question (C) is one which may be presented for the consideration of this Court at all, it should more properly be stated as follows:

C.

Whether the plaintiff's cause of action for damages has been prejudged, and the plaintiff deprived of his right to a trial by jury under the Seventh Amendment, and deprived of his property rights without the due process of law accorded to him by the Fifth Amendment to the Constitution of the United States, in an action where (1) the plaintiff seeks equitable relief, or in the alternative that he be allowed to recover damages at law; (2) these alternative actions are tried together before the same jury sitting as an advisory jury in equity upon the equitable issues, and as a common law jury upon the issues as law; (3) judgment is entered in the District Court in favor of the plaintiff upon the equitable issues, and no action taken upon the alternative law action for damages; (4) on appeal to the Court of Appeals the entire evidence upon both issues is before the Court of Appeals; (5) the Court of Appeals reverses the judgment in favor of the plaintiff upon the equitable issues, and (6) in the course of the opinion comments upon (does not decide) the evidence relating to the law action, but specifically states that: "We express no conclusions in respect to that action" (R. 779); and remands the cause with directions to dismiss the equity action and for further proceedings on the law action (R. 779).

ARGUMENT.

It is the contention of respondents that the Petition for Writ of Certiorari herein not only completely fails to present any of the "special and important reasons" as outlined in Paragraph 5(b) of Rule 38 of the Rules of this Court for the granting of the writ, but fails to present any reason whatsoever why this Court, in the exercise of a sound judicial discretion, should grant the writ.

We will discuss the points submitted by the petitioner in the order presented in the Petition and in the supporting brief.

I.

The decision of the Court of Appeals is in conformity with the provisions of Rule 52(a); is not in conflict with controlling decisions of this Court or decisions of other Federal Circuits construing Rule 52(a); and is not in conflict with Missouri contract law on joint adventure and the modern doctrine of coercion.

As heretofore pointed out, the Court of Appeals in its opinion decided only one question, to-wit: that the finding of the trial court that the plaintiff signed the written agreement of March 12, 1945, because wrongfully coerced into doing so by the acts of the defendant George Bennett (R. 767-768), was clearly erroneous and must be set aside; and that the finding is not sustained by substantial evidence (R. 779).

The court reached this conclusion after a complete review of the evidence relating to the issue of coercion and duress, and in so doing did not reject or disregard any of the evidence on behalf of plaintiff upon this issue.

In respect to the evidence relating to this issue, the court stated that "we find no conflict as to any matter of substance" (R. 774). After giving full effect to all of the evidence on this issue, the court held as a matter of law that the facts presented did not constitute evidence of duress or coercion which, under the law of Missouri and elsewhere, would justify the setting aside of a written contract (R. 777).

In considering the evidence relating to this issue, the court gave full and complete recognition to the provisions of Rule 52(a) of the Rules of Civil Procedure. After quoting the finding of the trial court relating to coercion and duress (R. 768), the Court of Appeals said (R. 768):

> "On turning to this question first we note that the court's finding is very general and does not specify any particular 'acts and conduct' of Bennett towards Mahon found to be wrongful or to amount to duress and coercion and deprivation of Mahon's exercise of his free will. There was no general finding that the allegations of the petition were true.
>
> "Accordingly, we have made independent examination of the record, *recognizing that we should sustain the finding unless it was clearly erroneous.*" (Our italics.)

After stating its conclusion that the finding of coercion was clearly erroneous, the Court of Appeals cited the decision of this Court in the case of *United States* v. *Gypsum Company,* 333 U. S. 364; 68 S. Ct. 525, as indicating the principles followed in the application of the provisions of Rule 52(a). In that case, in discussing the proper application of the provisions of Rule 52(a), this Court said (333 U. S. l. c. 395; 68 S. Ct. l. c. 542):

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court

> on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In the case at bar, it is submitted that there was in fact *no evidence* to support the finding of duress; since that evidence, viewed most favorably to plaintiff, does not consist of facts sufficient to constitute duress, under the law of Missouri or elsewhere, so as to justify the setting aside of a written contract.

The decision of this Court in the case of *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 70 S. Ct. 177, cited by petitioner, does not in any way modify the ruling of this Court in the Gypsum Company case, but merely applies the rule to a situation entirely different from that in the case at bar. *See* the recent case of *Orvis* v. *Higgins* (2 Cir.), 180 Fed. 2d 537, for a discussion and analysis of the decision of the *Gypsum Company* case, in the light of the decision in the *Yellow Cab Company* case, in which the Court of Appeals for the Second Circuit stated (180 Fed. 2d, l. c. 539):

> "We think that *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 70 S. Ct. 177, did not modify what was said in the *Gypsum case.*"

In the case of *Chatz* v. *Armour Plant Employees' Credit Union* (7 Cir.), 154 Fed. 2d 236 (certiorari denied, 329 U. S. 728, 67 S. Ct. 83, rehearing denied, 329 U. S. 827, 67 S. Ct. 185), the Court of Appeals for the Seventh Circuit, after referring to the requirments of Rule 52 of the Rules of Civil Procedure (154 Fed. 2d l. c. 239), gave consideration to a finding that a certain agreement had been entered into as the result of duress and the evidence in support thereof. In passing upon this point, the court said (154 Fed. 2d l. c. 240):

> "Construing the testimony most favorably in support of this finding, as we are required to do, we are persuaded that there is no evidentiary support for a finding of duress.
>
> "Equally conclusive on this issue of duress is the failure of plaintiff to seasonably seek avoidance of the agreement because of the alleged duress."

In the case at bar, the plaintiff began work under the written contract of March 12, 1945, early in April, 1945, and worked and received pay thereunder without protest for five months (R. 229), and is still claiming the right to recover damages for the alleged breach thereof.

We submit that, in deciding that the finding of duress was clearly erroneous, the Court of Appeals did not transcend its powers under Rule 52(a), nor is its decision in conflict with controlling decisions of this Court, or with the decisions of other Federal Circuits construing Rule 52(a). On the contrary, the Court of Appeals proceeded in exact conformity with the provisions of Rule 52(a), and the decisions of this Court and of other Federal Circuits in construing said Rule.

The Issue of Joint Adventure.

As already pointed out, the Court of Appeals did not decide the question whether the finding that plaintiff and defendant George Bennett entered into an oral agreement of joint adventure (R. 739) was erroneous. The Court having found that the written contract of March 12, 1945, could not be set aside for duress, it necessarily followed that the written contract is controlling, and it was unnecessary to decide whether or not the alleged prior oral agreement of joint adventure covering the same subject matter was entered into.

The petitioner complains of the comments of the Court of Appeals upon the evidence relating to the alleged oral agreement of joint adventure. These comments are unimportant because that issue was not decided by the Court of Appeals. We submit, however, that the petitioner's criticisms of the comments of the Court of Appeals on the evidence relating to this issue are entirely unjustified.

The petitioner seems to take the position that because there is a conflict in the testimony of Mahon and of Bennett in respect to the alleged agreement of joint adventure, the trial court having had the opportunity to judge of the credibility of the witnesses, the finding of an oral agreement of joint adventure is now unassailable.

This argument overlooks that there are undisputed facts based upon documentary evidence which weigh heavily, if not conclusively, against the plaintiff's claim that an oral agreement of joint adventure was entered into with the defendant George Bennett.

The length and breadth of the scope of the alleged oral agreement of joint adventure claimed by plaintiff to have been entered into is actually embraced in the following vague and sketchy testimony of plaintiff (R. 161):

> "Q. All right. And then did you contact Mr. Bennett some more?
>
> "A. I contacted him again, I think it was on Saturday, the following Saturday. I got through at the City Hall at noon and I went over there Saturday afternoon and I told him that his plan that I not contact anyone else or raise any other funds was satisfactory; that I would take him into the business and that I would be very happy to work it out that way, and that he would put up the $150,000.00, I would put up the $10,000.00; we would split the

profits fifty-fifty and we would amortize our original investments over the years as fast as we could.

"Q. And what did he say to that?

"A. He said, 'That suits me fine.' He said, 'I am very happy to have that type of business offered and will hope very much that we can get the contract.' That is the contract with the City.

Q. Now, approximately when was that, Mr. Mahon?

A. Well, I would say that was November 11th, I would say it was; * * *"

It would require the most cogent, convincing, clear and precise evidence to justify the incomprehensible conclusion that two business men intended to enter into a one-sided contract of joint adventure involving operations and responsibilities of great magnitude extending over a period of years, and requiring the advancement of several hundred thousand dollars by only one of the joint adventurers, without specifying with great particularity the many details relating to the rights and responsibilities of the respective parties.

Admittedly this was not done, and the circumstances are all much more consistent with the position that the discussions were preliminary negotiations only, and did not even approach the dignity of a meeting of the minds upon a final and firm contract of joint adventure involving the expenditure of several hundred thousand dollars, and extending over a period of approximately ten years.

Furthermore, when these discussions took place, it was not known what would be included in the specifications when and if the City asked for bids for the collection and disposal of garbage. When specifications were promulgated about the middle of February, 1945 (with amendments as late as early in March, 1945), then and only

then could Mr. Mahon and Mr. Bennett discuss intelligently any final arrangement to be made between them.

In the contract document relating to the collection and disposal of garbage in Kansas City, and in the specifications, among other things, the requirements in regard to the type and amount of equipment, the number of collections, sanitary requirements and the like are set forth in great detail (R. 368-412), and it was stipulated that:

> The successful bidder (the Contractor) must furnish a Surety Bond in the sum of $50,000.00 (R. 404-407);
>
> All superintendents, foremen and workmen employed by the Contractor must be careful and competent, and subject to dismissal upon demand by the Director of Public Works for incompetency or misconduct (R. 371);
>
> For failure to perform the contract, the city could annul the contract, and without compensation to the Contractor take over the work and equipment and facilities and complete the contract (R. 373-374);
>
> The Contractor was required to give the work his constant attention to facilitate the progress thereof (R. 372);
>
> Neither the Contract, nor any portion thereof, could be sublet without the written consent of the Director of Public Works (R. 375); and
>
> Severe penalties could be imposed for failure to make collection of garbage as required by the contract (R. 387-388).

These and many other provisions of the contract and contract specifications demonstrate that the City would look to the contractor, and to the contractor alone, for the performance of the contract, and that Mr. Bennett very wisely and properly stipulated in the preliminary negotiations that no definite arrangements could be made

with the plaintiff until the specifications were available for examination.

As soon as the specifications were finally available, Mr. Bennett consulted with Mr. Mahon, and made him a proposal, which was in keeping with the requirements of the City's specifications and which resulted in the written contract of March 12, 1945. All discussions prior thereto were preliminary negotiations and were merged into the written contract.

This undisputed documentary evidence is sufficient to destroy the credibility of the plaintiff's testimony that there was an oral agreement for the perfomance of a ten-year contract with the City, the terms of which were not yet known. It was not a question of weighing the plaintiff's testimony against that of George Bennett. It was a question of weighing plaintiff's testimony against documentary evidence which made plaintiff's testimony incredible.

Under well-settled rules it clearly appears that the few general remarks which plaintiff claims were made prior to the execution of the written contract were not such as to establish a meeting of minds upon an oral agreement for the performance of the ten-year city contract under a partnership or joint adventure agreement.

In the case of *Miller* v. *Miller,* 311 Mo. 110, l. c. 124; 277 S. W. 922, l. c. 926, the court said:

> "In *Chapin* v. *Cherry,* 243 Mo. 375, 147 S. W. 1084, a case where two parties plaintiff sought to establish a partnership ownership of a tract of land purchased by and in the name of defendant, this Court discussed the elements of proof necessary to show the existence of a partnership in this wise:
>
> > 'The primary question, therefore, presented for determination is, Did a partnership relation

exist between them at the time the land was purchased by the appellant? If so, it must be because a partnership agreement between them must have been entered into prior to the date of said purchase. That is self-evident, and before there could have been such a contract, the minds of all the parties thereto must have agreed to the same thing, in the same sense and at the same time. This mutual assent of the parties must embrace all the propositions of the parties, and so long as any matter forming an element of the contract is left open, the contract is not complete, and therefore not binding upon any of the parties. The foregoing statement of the law of partnership is announced by all of the authorities, here and elsewhere. *Green* v. *Cole,* 103 Mo. 70 (15 S. W. 317); *Sutter* v. *Raeder,* 149 Mo. 297 (50 S. W. 813). * * * From the earliest days in this state, this Court has been wedded to the doctrine that general remarks occurring in a conversation between two or more parties regarding a business proposition are not sufficient evidence of a partnership agreement. *Price* v. *Edwards,* 11 Mo. 524. The terms, conditions and elements of the proposed co-partnership must be unequivocally and unconditionally agreed to by all the parties thereto, without any variance between the propositions or conditions proposed by any one of them and the acceptance by the others. Or, as was held in the case of *Mackie* v. *Mott,* 146 Mo. 230 (47 S. W. 897), the foundation of a co-partnership is one of intention by all the parties thereto, which must be arrived at from the contract itself, and surrounding circumstances. * * * These are some of the reasons why the law permits every person to select his own partners and never presumes the existence of a co-partnership, but requires those who assert its existence, especially as between themselves, to prove its exist-

> ence, by the clearest and most positive evidence.' "

In *Prasse* v. *Prasse* (Mo. Sup. Ct., not officially reported), 77 S. W. 2d 1001, l. c. 1005, the court said:

> "To the foregoing, we add that, fundamentally, to constitute a partnership, 'there must be such a community of interest as impowers each party to make contracts, incur liabilities, manage the whole business and dispose of the whole property, a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased.' *Musser* v. *Brink,* 68 Mo. 242, 249. And to establish a partnership, its existence must be proved by evidence which is cogent, clear, and convincing, and its terms and conditions must be unequivocally and unconditionally agreed to by the parties. *Chapin* v. *Cherry,* 243 Mo. 375, 147 S. W. 1084; *Medlin* v. *Morris,* 243 Mo. 260, 148 S. W. 85; *Miller, by Hampe* v. *Miller,* 311 Mo. 110, 277 S. W. 922; *Dixon* v. *Dixon* (Mo. Sup.), 181 S. W. 84."

In the case of *Elkhorn-Hazard Coal Co. et al.* v. *Kentucky River Coal Corporation* (6 Cir.), 20 Fed. 2d 67, l. c. 70, the court said:

> "• • • Whether a contract results from an exchange of definite communications, when a formal contract is intended later to be prepared and executed, is a question which has received much consideration. Whether one so results is mainly a question of intention. The law is well stated in *Mississippi & Dominion Steamship Co.* v. *Swift,* 86 Me. 248, 29 A. 1063, 41 Am. St. Rep. 545, 553, as follows:
>
> > 'If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an in-

tention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: If the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed. In determining which view is entertained in any particular case several circumstances may be helpful, as whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.' "

In connection with the foregoing, it will be recalled that plaintiff's testimony was to the effect that the amounts involved were large, the contract was an unusual one, and the negotiations indicated that a written contract was contemplated as a final conclusion of the negotiations (R. 158-162). Furthermore, the plaintiff's petition alleges that "plaintiff requested and the defendant George Ben-

nett promised the plaintiff that said agreement would be reduced to writing" (R. 3), so that it seems perfectly clear that the parties contemplated that any agreement entered into would be "of such a nature as to need a formal writing for its full expression."

We respectfully submit that the comments of the Court of Appeals upon the evidence relating to the issue of an oral agreement of joint adventure are completely in accord with the requirements of Rule 52(a), and the Missouri Contract Law on joint adventure.

We submit further, however, that since the Court of Appeals did not base its decision on a consideration of this issue, there is no possible basis for the petitioner's request to have that phase of the case reviewed by this Court.

The Issue of Coercion and Duress.

Plaintiff's claim of duress is simply this: that he had an oral agreement of joint adventure with the defendant George Bennett whereby Bennett would submit a bid in his own name for the collection and disposal of garbage in Kansas City, Missouri, if the City advertised for such bids, and if the contract was awarded to Bennett, the plaintiff and the defendant George Bennett would perform the contract as joint adventurers, the plaintiff to contribute $10,000.00 and Bennett to contribute $150,000.00 as capital for carrying out the joint adventure, and the profits to be divided equally; that plaintiff protested; that Bennett offered to enter into a new contract which offer was rejected by plaintiff, and at the same time Bennett stated that he was going to bid on the city contract in his own name; that after eight or nine days, during which time plaintiff negotiated for better terms

under the contract proposed by Bennett and at the same time sought to make arrangements with others to bid against Bennett on the city contract, plaintiff prepared and presented to Bennett the written contract which they both signed (R. 181-183, 195-198).

The plaintiff does not claim that Bennett threatened to refuse to bid on the city contract unless plaintiff agreed to a new contract. On the other hand, the testimony of plaintiff is to the effect that Bennett stated that he was going to bid on the city contract regardless of whether plaintiff did or did not accept his proposition for a new contract (R. 181-182).

It follows, therefore, that plaintiff did not prepare and execute the written contract in order to preserve his rights in the corpus of the alleged oral agreement. The plaintiff knew, as any ordinary business man would have known, that if he had a valid oral agreement with Bennett, and if Bennett broke that agreement, he (plaintiff) would have his remedy. He was an alert business man, holding a public office, and had money and assets of the value of $50,000.00 (R. 324), and was in no way dependent upon employment by Bennett under the written contract as a means of livelihood. He was, in every respect, free to stand upon the alleged oral agreement and to have had his remedy for any breach thereof if he had so chosen.

According to plaintiff's testimony, he fully understood that Bennett's course of action, with respect to the alleged agreement of partnership or joint adventure, would be exactly the same regardless of whether plaintiff accepted or rejected Bennett's offer to employ plaintiff under the terms of the written agreement.

Furthermore, according to plaintiff's testimony, Bennett never at any time demanded that plaintiff accept

the offer of employment, and never demanded that it be accepted or rejected within any fixed time.

If we disregard Bennett's version of this matter entirely, and accept in its entirety the testimony of the plaintiff as set forth in the record, and as stated in his brief in support of his Petition for Writ of Certiorari (pages 22-24), there is presented, as the sole basis for any contention of duress, the alleged claim that Bennett and plaintiff had an oral agreement to perform the city contract (the performance of which was to commence on July 15, 1945), and that on March 3, 1945, Bennett stated to plaintiff that he was not going on with the partnership or joint adventure agreement. The only loss threatened to plaintiff was his anticipated profits under the alleged oral agreement, and for this he had an adequate remedy at law in case he had chosen to stand upon his alleged oral agreement. In this conection, the plaintiff testified that he had investigated Bennett's financial worth, and Mahon makes no claim that he had any fears that Bennett was not financially able to respond in damages for any breach of the alleged oral agreement (R. 160-161).

Upon a review and consideration of all of plaintiff's evidence, the Court of Appeals properly held that under the Missouri law the evidence did not establish coercion or duress or any ground to avoid the written contract of March 12, 1945 (R. 777).

This conclusion is completely supported by the decisions of this Court and of the Supreme Court of Missouri upon this question.

In the case of *Hartsville Oil Mill* v. *United States,* 271 U. S. 43, 46 S. Ct. 389 (cited and quoted from in the case of *McKenzie-Hague Company* v. *Carbide & Carbon Chem-*

icals Corporation, 73 Fed. 2d, 78, l. c. 84, decided October 3, 1934, by the Eighth Circuit Court of Appeals), the Supreme Court said (271 U. S., l. c. 49; 46 S. Ct., l. c. 391):

> "* * * But a threat to break a contract does not in itself constitute duress. Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate."

If, as contended by plaintiff, there was a breach of the alleged oral agreement, he had an adequate remedy at law, but instead of standing upon his rights (if any) under the alleged oral contract, he voluntarily elected (more than four months prior to the time for the commencement of the performance of the city contract under the alleged oral partnership or joint venture agreement) to enter into the written contract of employment, thereby knowingly waiving his rights, if any, under the alleged oral agreement. In this connection plaintiff testified as follows (R. 205):

> "I thought that I would have to comply with the conditions of the written contract which we had both signed, and that that would destroy the original contract which I had had with Mr. Bennett."

A situation somewhat like plaintiff's claim of duress was presented in the case of *Wood* v. *Kansas City Home Telephone Co., et al.,* 223 Mo. 537, 123 S. W. 6 (cited with approval in the case of *Furman* v. *Gulf Insurance Co. of Dallas, Texas, et al.,* 152 Fed. 2d 891, l. c. 894, decided January 10, 1946, by the United States Court of Appeals for the Eighth Circuit).

In a full and able discussion of the law of duress, as applicable to a situation of this kind, Judge Graves (*Wood* v. *Telephone Co., supra,* 223 Mo., l. c. 557-560; 123 S. W., l. c. 12-13) said among other things:

> "That the contract before us is one of three made at the same time, effecting a compromise between the parties heretofore mentioned, is unquestioned. That a contract made by way of compromise may be impeached on the ground of duress we take it to be well settled. In 8 Cyc., at page 523, it is said: 'Duress, if proved, is sufficient to relieve a party from the effect of a compromise which is procured by such means. To establish duress, however, the evidence must show facts reasonably adequate to overcome the will of the party making the compromise.' But what is duress? Some states have statutes giving definitions, but not so in Missouri. With us we must go to the common law, and such modifications thereof as have been made by the courts, if any such have been made. By the common law duress was divided into two classes: (1) Duress by imprisonment; and (2) duress *per minas.* 9 Cyc., p. 444. Of the latter class are such Missouri cases as *Lacks* v. *Bank,* 204 Mo. 455, 102 S. W. 1007, and *Hensinger* v. *Dyer,* 147 Mo. loc. cit. 226, 48 S. W. 912. The class is thus defined by the same authority, at page 445: 'Duress *per minas* arises when a person (1) is threatened with loss of life, (2) is threatened with loss of limb, (3) is threatened with mayhem, or (4) is threatened with imprisonment, and only in these cases at common law.' So, too, says the Kansas Court (*McCormick* v. *Dalton,* 53 Kan., loc. cit. 149, 35 Pac. 1114: 'It is apparent from the evidence given by Dalton upon the trial that the execution of the written contract was not procured by duress. *Cable* v. *Foley,* 45 Minn. 421, 47 N. W. 1136; *Hackley* v. *Headley,* 45 Mich. 569, 8 N. W. 511; *Peckham* v. *Hendren,* 76 Ind. 47; *Emmons* v. *Scudder,* 115 Mass. 367. Duress, in its more extensive

sense, is that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness. Text-writers divide the subject into "duress *per minas*" and "duress of imprisonment." See *Anderson* v. *Anderson,* 9 Kan. 112; *Helm* v. *Helm,* 11 Kan. 19; *National Bank* v. *Croco,* 46 Kan. 620, 26 Pac. 939.') But in modern practice the courts have gone further, and this later doctrine is thus stated by the same authority (9 Cyc., p. 450): 'The modern doctrine holds that there is no legal standard of resistance which a person acted upon must come up to at his peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is: Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purposes of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby constrained? Duress, then, according to this class of cases, includes that condition of mind produced by the wrongful conduct of another, rendering a person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.' As to what will not constitute duress in law, the same authority (9 Cyc., p. 448), says: 'What is not legal duress: Duress by mere advice, direction, influence, and persuasion is not recognized in law. Nor can a charge of legal duress be predicated upon a threat to injure one's credit, to withhold payment of a debt, to refuse performance of a contract, or to foreclose or exercise the power of sale on a mortgage; a threat of arrest or arrest on civil process on a legal claim, when such arrest is allowed by law; or a threat of, or the bringing of a lawsuit or civil process.' Some modern cases recognize the doctrine of threats to destroy property or duress of goods

under oppressive circumstances; but, whatever be the kind of alleged duress, the test of the mental condition is as above stated.

"One of the things in this compromise contract was the fact that Enoch was refusing to carry out his contract of September 28th. 'To refuse performance of a contract' is not duress. In *Tucker* v. *State ex rel.*, 72 Ind., loc. cit. 245, the court says: 'As to the claim of the appellants Thompson and Harris that the bond was executed under duress, it may be said that threats to withhold the payment of a debt, or to refuse the performance of a contract, or to do an injury which may at once be redressed by legal process, are not duress. 6 Wait's Actions & Defenses, p. 658.' In the McCormick case, *supra,* Dalton claimed to have an oral contract with McCormick to construct a mile of railroad grade; that after he began to work he was presented with a written agreement for only one-half mile of the more expensive work at the same price, and, upon his refusal to sign it, McCormick told Dalton's men that he would not further stand for their pay and he (Dalton) could stop work; that Dalton was unable financially to carry on the work unless McCormick paid the men; that under this pressure of losing his contemplated profits, his work already done, and his inability financially to carry on the work, he signed the contract. It was held by Horton, C. J., that the contract was not procured by duress. And Gilfillan, C. J., in *Cabel* v. *Foley,* 45 Minn., loc. cit. 422, 47 N. W. 1136, says: 'That the execution of the contracts was procured by duress would not be established by the evidence offered for that purpose. It amounted to no more than that, plaintiff being without means to pay his men, the defendants refused to pay him what was then due him, unless he executed the contracts. The mere threat to withhold from a party a legal right, which he has an adequate remedy to enforce, is not, in the eye of the law, duress; certainly not such as will avoid the execution of a contract. *Hackley* v.

Headley, 45 Mich. 569, 8 N. W. 511; *Miller* v. *Miller,* 68 Pa. 486.' The Michigan case cited by the Minnesota court is in full accord, and the opinion therein is by the distinguished Justice Cooley, *Goebel* v. *Linn,* 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; *Miller* v. *Miller,* 68 Pa. 486; *Domencio* v. *Alaska Packers' Ass'n* (D. C.), 112 Fed. 554."

and in conclusion with respect to the claim of duress the court said (223 Mo., l. c. 562; 123 S. W., l. c. 14):

"* * * Men of parts, as these defendants are shown to be, did not have their will power so dwarfed by the circumstances as to obviate a solemn contract which was finally drafted by them in the privacy of their own office. They no doubt knew that they had on hand a lawsuit to compel Enoch to comply with his agreement of September 28th, and it may be that they likewise knew that Enoch had at least some defense to that action. They were exceedingly anxious to compromise, and did compromise, and the contract in suit is the result. To our mind the contract, which is one growing out of the tri-party agreement, is not voidable for the alleged ground of duress."

See also:

Morgan v. *Joy,* 121 Mo. 677, 26 S. W. 670.
Tanner v. *West,* 339 Mo. 738, 99 S. W. 2d 7.

We submit that the decision of the Court of Appeals upon the issue of coercion and duress is in complete conformity with the requirements of Rule 52(a), and with the decisions of this Court and the Missouri Supreme Court, relating to this subject, and that the Petition for Writ of Certiorari presents no sound basis for the issuance of the writ.

II.

The petitioner was not deprived of his claimed constitutional right under the Seventh Amendment to a trial by jury of the issues relating to joint adventure and duress.

The question sought to be presented by petitioner in Question B (Petition, pages 4-5), and in the argument in support thereof (Point II, Petition, pages 32-35), was not presented or decided in the trial court, nor was it presented or decided in the Court of Appeals. There is therefore no basis for petitioner's request that this Court review that question.

Petitioner repeatedly asserts in his petition and brief in support thereof that the plaintiff has invoked the Federal Declaratory Judgment Law (Petition, pages 2, 4, 33). This action was first filed in the State Circuit Court and thereafter removed to the Federal Court for diversity of citizenship (R. 1, 11). Obviously, the suit when filed in the state court was not based on the Federal Declaratory Judgment Law. No reference is made to the Federal Declaratory Judgment Law in any of the pleadings, and the significance of the contention that plaintiff invoked the Federal Declaratory Judgment Law is not apparent.

Presumably, the question involved in determining whether, under the Seventh Amendment, the plaintiff, upon timely request, was entitled to a trial by jury of the issues relating to joint adventure and duress, will depend upon whether the action involving these issues was a suit at common law or a suit in equity. Whether the action was under the Federal Declaratory Judgment Law or under general law, it is well settled that if the issues tendered by the pleadings are equitable in their nature and call for equitable relief, the case is one in equity.

Williamson v. *Frazee,* 294 Mo. 320, l. c. 329; 242 S. W. 958, l. c. 961.
Ebbs v. *Neff,* 325 Mo. 1182, l. c. 1191; 30 S. W. 2d 616, l. c. 620.
Stewart et al. v. *Shelton,* 356 Mo. 258, l. c. 263; 201 S. W. 2d 395, l. c. 397.

In the recent case of *Fireman's Insurance Co. of Newark* v. *Smith* (8 Cir.), 180 Fed. 2d 371, inserted on the cover page of petitioner's brief, the court specifically states (l. c. 374):

> "In any case the consideration to be given to the verdict depends upon whether the issues are legal or equitable."

The petitioner in this case (R. 1-7) seeks equitable relief in that he seeks to have an oral agreement established and enforced, to have a written contract set aside for duress, and to have an injunction and an accounting. The plaintiff alleges in his petition (R. 6) that he stands ready "to do equity as a condition to the relief" above referred to.

Plaintiff's counsel treated this branch of the case as an action in equity. At the beginning of the first trial the following colloquy took place between the court and plaintiff's counsel (R. 18-19):

> "The Court: What is he (plaintiff) seeking?
> "Mr. Stinson: He is seeking alternative relief. First, he is asking a finding by the trier of the facts that there was an agreement of joint adventure between Bennett and him under the terms of which they were equal partners in this business.
> "The Court: Yes?
> "Mr. Stinson: And that, second, on this day that the bidding, that is the letting was had, he, Mahon, was forced to sign this written contract, *and the*

equitable relief that is sought under that contract is, first, the finding of the oral agreement; second, the compulsion; and, third, restoration to the rights of a partner in an accounting.

"The alternative plea is that, in the alternative, if the finding is not in his favor on the oral agreement, the compulsion and the accounting, that within a few weeks after he, Mahon, entered upon his job under the terms of the written contract he was wrongfully discharged.

"The Court: And a suit for damages?

"Mr. Stinson: And the prayer for damages is asked." (Italics supplied.)

Plaintiff's counsel requested findings of fact and conclusions of law in accordance with equity practice (R. 738), and among the findings requested by him and given by the court is the following (R. 740):

"5. In his pleading the plaintiff has offered to do equity as a condition to the equitable relief sought herein."

In the Court of Appeals counsel for plaintiff treated this branch of the case as an action in equity. Among other assertions in his brief in the Court of Appeals he states that "The Decree for an Accounting is Sound Equity and a Proper Remedy" (Brief of Appellee filed in Court of Appeals, pages 31, 98).

In these circumstances it is difficult to see on what ground the plaintiff can now contend that he was entitled to a trial by jury as in a suit at common law upon the issues relating to joint adventure and duress.

This question was not presented or decided in the trial court, was not presented or decided in the Court of Appeals, and there is no ruling in respect thereto which could be brought to this Court for review.

III.

The Court of Appeals did not prejudge the plaintiff's claims under the written contract and the plaintiff has been deprived of no constitutional rights in respect thereto.

Here again the petitioner is seeking to bring to this Court for review a question that was not presented for decision nor decided by the Court of Appeals.

At the request of the plaintiff, and over the objections of the defendant, the trial court impaneled one jury (a) to act as an advisory jury in equity in respect to the issues relating to whether there was an oral agreement of joint adventure, and if so, whether the written contract of March 12, 1945, was entered into as the result of duress, and (b) to act as a common law jury in respect to the plaintiff's claim for damages for the alleged breach of the written contract (R. 21-25, 122-123).

Consequently, the evidence relating to all of these issues was presented at one trial before one jury, and was included in the record before the Court of Appeals (see Certifiate of Reporter, R. 759-760).

At the close of the evidence (R. 639), the defendants moved the court to require the plaintiff to elect upon which one of his said alleged causes of action he would proceed, which motion was by the court denied (R. 639). This point was renewed in the defendant's Motion for a New Trial (R. 745, paragraph 6).

In plaintiff's brief filed in the Court of Appeals, in discussing whether plaintiff had made or was required to make an election, counsel for plaintiff stated (Brief for Appellee, page 95):

> "Rather than electing to stand on the written contract, as the record now stands, plaintiff has elected to stand on the joint adventure agreement and to

abandon his claims under the written contract. The jury and the court below having ruled in plaintiff's favor on the joint adventure agreement, plaintiff's claim under the written contract automatically ended. Indeed, his primary relief sought that very thing. He asked to get out of the written agreement and to be restored to his rights under the joint adventure.

* * * * * * *

"The contention that plaintiff has not rescinded the written agreement is equally untenable. *The primary relief sought was itself a disaffirmance of the written contract.* Indeed, the relief granted by the decree had to include the elimination of the written agreement." (Author's italics.)

In these circumstances, after the Court of Appeals decided that the judgment upon the alleged oral agreement should be reversed on the ground that the written contract covering the same subject matter had not been obtained as the result of duress, the court very properly gave consideration to whether in the order reversing and remanding the cause, further proceedings upon the law action based upon the written contract should be allowed. In considering this matter it was entirely within the province of the Court of Appeals to comment upon the evidence relating to the law action. The comments made are all based upon the record evidence. The court made no decision upon the merits of the law action, but specifically stated: "We express no conclusions in respect to that action" (R. 779).

The order of the Court of Appeals that, upon reversal of the judgment based on the equity action, the cause be remanded "for further proceedings on the law action" (R. 780), was favorable to plaintiff, and there is no basis for the contention that the law action has been

prejudged or that the plaintiff has been deprived of any of his constitutional rights in respect thereto.

We respectfully submit that the petitioner has completely failed to present any reason why this Court, in the exercise of a sound judicial discretion, should allow a review of the decision and judgment of the Court of Appeals in this action, and that the writ should therefore be denied.

Respectfully submitted,

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